



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

JUN 25 2009

Todd D. Gray, Esq
Jeffrey J. Hunter, Esq.
Dow Lohnes PLLC
1200 New Hampshire Ave, NW
Suite 800
Washington, DC 20036

RE: MUR 6131
Public Television 19, Inc.

Dear Messrs. Gray and Hunter:

On November 20, 2008, the Federal Election Commission ("Commission") notified your client, Public Television 19, Inc., of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On June 18, 2009, the Commission found, on the basis of the information in the complaint and information provided by your client, that there is no reason to believe that Public Television 19, Inc. violated the Federal Election Campaign Act of 1971, as amended, or the Commission's regulations. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Roy Q. Luckett, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

Thomasenia P. Duncan
General Counsel

A handwritten signature in cursive script, reading "Susan L. Lebeaux".

BY: Susan L. Lebeaux
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Public Television 19, Inc.

MUR 6131

I. INTRODUCTION

The complaint in this matter alleges that Public Television 19, Inc. ("Public Television") staged a debate in violation of 11 C.F.R. § 110.13(b) and (c) because it promoted some candidates over others and had no pre-existing, pre-established criteria for selecting the candidates to participate. According to the complaint, the debate consisted of one candidate competing in the election for the U.S. House of Representatives in Missouri's 6th Congressional District, Democratic nominee Kay Barnes, and an "empty chair" representing another competing candidate, Republican incumbent Representative Sam Graves, who had declined to participate in the debate. The complainant, the Libertarian candidate for the same office, alleges that he was never invited to participate and that Respondent's president informed him that there would be no debate. Further, the complaint alleges that Public Television's violation of 11 C.F.R. § 110.13 resulted in an in-kind contribution in excess of \$100,000 (alleged cost of advertising time during the debate) to Kay Barnes's campaign. In response, Public Television maintains that it complied fully with the Act and the Commission's regulations when preparing for a candidate debate that ultimately never took place. Moreover, Respondent states that the October 10, 2008, interview with Kay Barnes, which is the subject of the complaint, enjoys First Amendment protection under the "press exemption."

As discussed in more detail below, Public Television's airing of the October 10, 2008, interview with Kay Barnes did not constitute a debate, and therefore was not subject to the Commission's debate staging regulations. Additionally, Public Television falls within the press

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1 exemption, as it a press entity that is not owned or controlled by any political party, committee,
2 or candidate, and the television program in question was a legitimate press activity. Therefore,
3 the Commission has determined to find no reason to believe that Public Television 19, Inc.
4 violated the Federal Election Campaign Act of 1971, as amended ("the Act"), or the
5 Commission's regulations.

6 **II. FACTUAL AND LEGAL ANALYSIS**

7 **A. Facts**

8 Public Television is a non-profit 501(c)(3) corporation that owns the license to operate
9 both analog and digital broadcasting for the noncommercial and educational television station
10 KCPT Channel 19. Originally formed as an instructional television station owned and operated
11 by the Kansas City Missouri School District, Public Television eventually became a Public
12 Broadcasting Service ("PBS") member in 1970 and has transmitted national PBS programs ever
13 since. See <http://www.kcpt.org/about/index.shtml>. In addition to national PBS programming,
14 KCPT also broadcasts a variety of local programs reflecting issues facing the Kansas City
15 metropolitan area. Included among these programs is "Kansas City Week in Review"
16 ("KCWR"), a 30-minute public affairs program that has aired continuously on KCPT on Fridays
17 evenings at 7:30 p.m. since October 1992. Public Television Response at 8. Its format is similar
18 in scope to Sunday network news programs like NBC's "Meet the Press" and CBS's "Face the
19 Nation" as moderator Nick Haines conducts interviews with Kansas City area newsmakers and
20 engages in panel discussions with local journalists. KCPT states in response to the complaint
21 that it does sell any airtime for commercial, political, or issue advertisements given its status as a
22 public broadcast station. *Id.* at 2, footnote 5.

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1 According to the response, in July 2008, KCPT was contemplating staging a debate of
2 selected candidates for the 2008 general election to the United States House of Representatives
3 for Missouri's Sixth Congressional District. Complainant David Browning called Respondent
4 during that month, requesting inclusion in the anticipated debate. *Id.* at 6. At that time, Susan
5 Stanton, KCPT Interim CEO and President, notified Mr. Browning during their phone
6 conversation that KCPT had not yet determined whether it would proceed with or cancel the
7 contemplated debate. *Id.* On July 29, 2009, KCWR moderator Nick Haines attempted to contact
8 Browning by telephone and left a voicemail message, reiterating that KCPT had not yet decided
9 whether it would proceed with the debate "because the incumbent candidate had not responded
10 to KCPT's overtures." *Id.* Mr. Haines also offered to send the complainant a copy of
11 KCPT(TV)'s debate policy.

12 The Respondent states that it devised its debate policy in 2000 after consulting with PBS
13 stations throughout the country and the PBS Best Practices in Journalism Unit. *Id.* at 4. The
14 policy establishes certain criteria that candidates must satisfy to be eligible to participate in
15 KCPT sponsored debates. The first criterion qualifies candidates who can demonstrate public
16 support of seven percent or more in one public opinion poll. *Id.* If a candidate has met this
17 threshold, to be eligible for participation, he or she must also meet at least three of the following
18 criteria: (1) file a campaign finance report revealing 20 contributions unrelated to the candidate
19 or candidate's family; (2) maintain a candidate website detailing biography and issues;
20 (3) minimum of 25 yard signs promoting candidacy in 25 different locations in the area that
21 candidate would serve; (4) demonstrate participation in other candidate forums, not just televised
22 debates; and (5) demonstrate community engagement by staging 12 campaign related events,
23 news conferences or neighborhood association meetings. *Id.* at 4-5. Based on Mr. Haines's

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1 review of Mr. Browning's public opinion poll support levels, the complainant's campaign failed
2 to meet the polling requirement, as he had registered only 4% public support at the time
3 Respondent considered holding a debate. Thus, the other criteria were not triggered, but if they
4 were, the only criterion complainant satisfied was his publication of a campaign website. On
5 August 18, 2009, Mr. Haines sent a letter to the complainant explaining KCPT's candidate
6 selection process for its debates and attached a copy of its debate policy. Public Television
7 Response, Exhibit B.

8 On August 25, 2008, the Graves campaign notified Respondent that the incumbent
9 candidate would not participate in the anticipated candidate debate. According to the
10 Respondent, it then determined that "proceeding with the contemplated debate without the
11 incumbent would not serve the public interest or KCPT(TV) viewers' needs" and "terminated its
12 plans to stage a candidate debate." *Id.* at 7. Subsequently, KCWR's October 10, 2008, edition
13 included Nick Haines's 11-minute interview with Democratic nominee Kay Barnes. After the
14 interview, the remainder of the 30-minute program focused on a roundtable panel discussion
15 with Mr. Haines and two local journalists about the Missouri congressional race between Graves
16 and Barnes and other unrelated topics. *Id.* at 9, Exhibit D.

17 The complaint argues that this program constituted a debate, noting that the Kansas City
18 Star newspaper, Time Warner Cable's "On Demand" TV description of the KCWR's
19 October 10, 2008, program, and even the Barnes campaign website in a press release all describe
20 the program as such. Complaint at 2. Moreover, the complaint alleges that moderator Nick
21 Haines described the interview with Kay Barnes as a debate on the broadcast, and notes that Kay
22 Barnes was seated next to one "empty chair" to represent the absent incumbent candidate. *Id.* at
23 3.

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Respondent disputes these allegations in its response. With respect to the classifications of the program as a "debate" by the Kansas City Star and the Barnes campaign, Respondent states that the complaint can cite no authority that would bind the Commission to subject the interview in question to the provisions of Sections 110.13 and 114.4(f) based on these second-hand descriptions. Public Television Response at 9. Additionally, Public Television maintains that "Mr. Haines did not describe the Kay Barnes Interview as a 'debate,'" noting that the moderator used the term "debate" "in the context of criticizing Representative Graves's refusal to participate in any televised debate during the election," not to suggest that the interview to follow constituted a candidate debate. *Id.* at 10. Finally, it contends that the complaint's characterization of the KCWR set as "evidence of an attempt to substitute an 'empty chair' for a debate-necessary second candidate is not only absurd, but clearly insufficient to deem the Kay Barnes' interview as a debate." *Id.* Respondent adds that the imagery of Kay Barnes and the empty chair was visible for only nine seconds at the beginning of the interview, when the camera panned in on the entire desk where the moderator was interviewing Ms. Barnes. *Id.* It further states that the reason for the third chair becomes evident in the next segment of the program, as the moderator conducted a panel roundtable discussion with two journalists. *Id.* See also Exhibit D. A review of a video of the program confirms Respondent's account of the broadcast. *Id.*

B. Analysis

The Act prohibits corporations from making contributions or expenditures from their general treasury funds in connection with any election of any candidate for Federal office. 2 U.S.C. § 441b(a). The Act defines "contribution" and "expenditure" to include any gift of money or "anything of value" made for the purpose of influencing any election for Federal

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1 office, but excludes any cost “incurred in covering or carrying a news story, commentary, or
2 editorial by any broadcasting station (including a cable television operator, programmer, or
3 producer), ... unless the facility is owned or controlled by any political party, political
4 committee, or candidate.” 2 U.S.C. § 431(8)(A)(i), (9)(A)(i), and (9)(B)(i); 11 C.F.R. §§ 100.52,
5 100.73, 100.111(a), and 100.132. This exclusion is known as the “press exemption.” or “media
6 exemption.” The term “anything of value” includes in-kind contributions. 11 C.F.R.
7 § 100.52(d)(1).

8 Any party claiming the press exemption is subject to a two-part test. First, the
9 Commission asks whether the entity engaging in the activity is a “press entity” within the
10 meaning of the Act and the Commission’s regulations. In determining whether an entity is a
11 press entity, the Commission has focused on whether it is in the business of producing on a
12 regular basis a program that disseminates news stories, commentary, and/or editorials. See
13 Advisory Opinions 2008-14 (Melothe, Inc.), 2007-20 (XM Satellite Radio Inc.), and 2005-19
14 (The Inside Track). Second, the Commission, in determining the exemption’s scope, asks (a)
15 whether the press entity is owned or controlled by a political party, committee, or candidate; and,
16 if not, (b) whether the entity was functioning within the scope of a legitimate press entity at the
17 time of the alleged violation. If the press entity is independent of any political party, committee,
18 or candidate, and if it was acting as a legitimate press entity at the time of the alleged violation, it
19 is exempt from the Act’s restrictions on corporate contributions and expenditures, and the
20 Commission’s inquiry should end. See *Reader’s Digest Association v. FEC*, 509 F. Supp. 1210,
21 1215 (S.D.N.Y. 1981); *FEC v. Phillips Publishing*, 517 F. Supp. 1308, 1312-13 (D.D.C. 1981);
22 Advisory Opinions 2008-14 (Melothe, Inc.), 2005-19 (The Inside Track), and 2005-16 (Fired
23 Up!).

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1 A corporation's costs of staging candidate debates are also exempt from the definitions of
2 "contribution" and "expenditure," at 11 C.F.R. §§ 100.92 and 100.154, respectively, and the
3 consequences that flow from making contributions and expenditures, provided that the debates
4 meet the "safe harbor" requirements of 11 C.F.R. §§ 110.13 and 114.4(f). The Commission's
5 regulations at section 110.13 also provide that broadcasters may stage candidate debates
6 provided that they are not owned or controlled by a political party, political committee or
7 candidate. 11 C.F.R. § 110.13(a)(2). The debates must include at least two candidates and not
8 be structured to promote or advance one candidate over another. 11 C.F.R. §§ 110.13(b)(1) and
9 (2). Organizations that stage candidate debates must use pre-established objective criteria to
10 determine which candidates may participate in the debate. 11 C.F.R. § 110.13(c).

11 In this matter, the complaint alleges that Public Television, through its television station
12 KCPT, violated 11 C.F.R. §§ 110.13 by staging a debate designed to promote some candidates
13 over others, and by selecting candidates without pre-existing pre-established criteria in selecting
14 the candidates that appeared at the debate. Neither of these allegations appears to be supported
15 by the facts. Although Respondent acknowledges that it originally contemplated staging a
16 debate with Representative Graves and Ms. Barnes, the only candidates satisfying Public
17 Television's pre-existing objective criteria for selecting candidates, when the incumbent
18 candidate would not participate in the anticipated debate, KCPT was left with only one candidate
19 who satisfied its own selection criteria. Accordingly, it terminated its plan to stage a candidate
20 debate. As no debate occurred, Respondent was not subject to the Commission's debate staging
21 regulations.

22 Instead, Public Television's October 10, 2008, interview of candidate Kay Barnes
23 represented activity that falls within the "press exemption." See 2 U.S.C. § 431(8)(A)(i),

(9)(A)(i), and (9)(B)(i); 11 C.F.R. §§ 100.73. First, Public Television is a press entity because it regularly produces and airs news stories and talk shows. The program that featured the interview, KCWR, has been on the air continuously for nearly 17 years, and focuses on newsworthy issues. In addition to KCWR, KCPT airs numerous local and national news and public affairs programs including, but limited to, "Frontline," "The Newshour with Jim Lehrer," "Washington Week in Review" and "Ruckus," another local public affairs program. Further, Public Television specifically denies that it is owned or controlled by any political party, political committee, or candidate, *see* Public Television Response at 8, and neither the complaint nor the available evidence suggests otherwise. Finally, the October 10, 2008, edition of the KCWR constituted legitimate press activity. It included an interview with a candidate in a manner similar to other television news programs like "Meet the Press" or "60 Minutes." *See* Public Television Response, Exhibit D. The fact that the program featured an interview with a candidate is immaterial, as on-air interviews of candidates fall within the bounds of the press exemption. *See, e.g.,* MUR 5569 (John and Ken Show). Accordingly, the alleged activity in this matter falls squarely within the press exemption. Therefore, the Commission has determined to find no reason to believe that Public Television 19 violated the Federal Election Campaign Act of 1971, as amended, or the Commission's regulations.

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